89-1380

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
ROBERT J. LOWEN, AND F. ELWOOD KYSER,

Petitioners,

v.

TIMOTHY A. BROWN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals's interpretation of section 401(c) of the Labor-Management Reporting and Disclosure Act as precluding consideration of the union's rule regulating distribution of union campaign literature in determining whether Brown's non-complying request to distribute literature was reasonable, which contradicts the holdings of two other circuits, is erroneous.

LIST OF PARTIES

In addition to the parties listed in the caption, the Secretary of Labor participated in the in banc proceedings as amicus curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

No.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
ROBERT J. LOWEN, AND F. ELWOOD KYSER

Petitioners

v.

TIMOTHY A. BROWN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

International Organization of Masters, Mates & Pilots, Robert J. Lowen and F. Elwood Kyser respectfully petition the Court for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Brown v. Lowen, et al, No. 88-2876, entered on November 17, 1989.

OPINIONS BELOW

The opinions of the panel of the Fourth Circuit which initially decided the case on September 14, 1988 are reported at 857 F. 2d 216 and are attached to this petition as Appendix A. The opinions entered on rehearing in banc are reported at 889 F. 2d 58 and are attached to this petition as Appendix B. The opinion of the district court is unreported and is attached to this petition as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 401(c), Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481(c):

> Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similiar distribution of the request of any other bona-fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list

shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

STATEMENT OF THE CASE

The International Organization of Masters, Mates & Pilots (MM&P) is a national labor union which has about 7,500 members, who are employed in the United States merchant marine. They occupy various positions around the country and the world related to shipping. The union has no locals, but includes several membership groups. The largest single group is the Offshore Membership Group, whose members work aboard deep sea vessels.

MM&P officers are elected every four years, by a mail ballot election. The election procedures are set forth in the MM&P constitution. The mail ballot

election lasts ninety days. Approximately thirty days prior to the commencement of the election, a convention is held, at which candidates are nominated. At that convention, a ballot committee of members is selected to oversee the election, as is an impartial balloting agency. The committee convenes after the close of the convention; at that time it selects an independent mailing service to mail the ballots and also examines the records of the persons who were nominated to determine whether they meet the constitutional qualifications for office so that they may be certified as candidates.

Candidates who wish to use the union mailing lists to mail campaign literature to members submit their literature to the independent mailing service, which mails the literature.

Under the procedures set forth in the union constitution and applied for many years, a candidate's right to make a campaign mailing begins after the convention. Once the independent mailing service is designated, the candidate makes his own arrangements with the mailing service to make mailings. There is no limitation upon the number of mailings which may be made, and mailings may continue throughout the period preceding the election and the ninety day election period itself.

Respondent Brown made a request in May, 1988, that he be permitted access to the union membership lists to make a mailing prior to the 1988 convention, scheduled for August 22, 1988. He stated that he planned to be a candidate for International President in the 1988 election. The union denied the request

based upon the longstanding application of the procedures set forth in the constitution.

Brown filed suit in the United States District of the District of Maryland, contending that his request to distribute literature before the convention was a reasonable request within the meaning of 29 U.S.C. § 481(c). Jurisdiction was founded on that section, which places the union and its officers under a duty to comply with any "reasonable" requests of a candidate to distribute literature, enforceable in the district court, and upon 28 U.S.C. § 1331. The court, deciding the case upon the parties' moving papers and affidavits, ruled in favor of Brown.

The union appealed to the Fourth Circuit. The case was initially heard before a three judge panel, which affirmed the decision of the district

court by a two-to-one majority, Judge Hall dissenting. The majority held that in determining whether Brown's request was reasonable, it did not need to consider the union's rule or the reasons for the rule, but instead should determine the reasonableness of the request based solely upon the request itself. It acknowledged that its interpretation of the statute contradicted that of the Third Circuit, but stated that it disagreed with that interpretation. The MM&P's petition for rehearing in banc was granted. After reargument, the in banc court adopted the panel opinion by an eight to two majority. Judge Phillips joined Judge Hall in dissent and filed a separate dissenting opinion.

REASONS FOR GRANTING THE WRIT

This case turns upon the interpretation of a statute that regulates union

election procedures, an important subject of federal concern. As is apparent from the opinions below, the resolution of this issue requires consideration of basic principles relating to the appropriate scope of regulation of the internal affairs of labor unions. The decision of the Fourth Circuit, whose underpinning is that the case could be decided without regard for the union's rule, strikes a hard blow at the principle of union self-government, a principle previously identified by this Court as an essential basis of the statute. This decision also conflicts with precedent from the Third and Ninth Circuits, which hold that reasonable union rules governing the distribution of literature should be followed. For these reasons, the case poses issues of public importance and should be reviewed by this Court.

The Fourth Circuit held that the sole question was whether Brown's request was reasonable, and that that question was to be resolved without regard to the request's compliance with the union's procedure for distribution of literature. It stated that this conclusion was "nothing more than a reading of the plain language of the statute." Opinion at 4. While an interpretation of a statute is always fortified if one can claim that it is no more than plain language, the issue is not that simple.

The plain language of the statute requires a union to comply with "reasonable" requests, not all requests. Thus, the statute itself necessarily poses the question of how a union should go about distinguishing between reasonable requests and unreasonable requests. One way to do this is to make

an individual determination, on the basis of each individual request, whether the request is reasonable or unreasonable. The other way is for a union to adopt a rule that treats all requests uniformly and provides advance notice to all candidates of the conditions to be applied. Nothing in the language of the statute forbids the second alternative, and thus plain language does not resolve the case.

As is apparent from the opinions below and the other authority on this issue, the choice between these alternatives depends upon the weight to be accorded the policies behind the statute. As Judge Phillips stated in his dissent, in deciding whether to give any consideration to the union's rule, a court decides whether a union is to be permitted to make rules governing election procedure. The determination

of the weight to be given the union rule in turn depends upon the weight to be given such values as union self-government. Thus, the statute cannot be interpreted without deciding questions relating to the policies underlying the statute.

This Court has previously made clear the importance of Congress's desire to preserve union self-goverment. In United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982), it stated:

> In drafting [LMRDA] Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess., 4-5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain minimim standards, "individual members are fully competent to regulate union affairs." Ibid. Thus, for example, in Title VI, which regulates the conduct of union elections, Congress

> simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections." Wirtz v. Glass Bottle Blowers, 389 U.S., at 471, 88 S. Ct., at 648.

457 U.S. at 117. The negation of the MM&P's power to govern itself is the more invidious because the procedure disregarded by the courts below is not a rule adopted by the union's officers, but a procedure set forth in the union's constitution, adopted by its members.

While the Fourth Circuit supported its decision by reference to the Act's purpose to foster free and democratic union elections, the court's decision ultimately frustrates union democracy by forbidding the union to adopt fair and orderly procedures.

Apart from the direct invasion upon a union's power to regulate its affairs which results from disregard of its rule in deciding a question of election

procedure, the Fourth Circuit's rule requires ad hoc evaluation of each request by a court without reference to the context of the request. That leads to judicial second guessing and needless government interference in internal union affairs.

The utility of this case as a vehicle for construction of the statute is enhanced by the fact that it turns entirely upon the interpretation of the statute and its underlying policies. As Judge Hall pointed out, "[i]n this case there has been no finding or even persuasive suggestion that IOMM&P's election procedures...is unfair, discriminatory, or provides any undue advantage to incumbents." The Fourth Circuit's decision does not rest upon a conclusion that the MM&P's rule is unreasonable, but rather upon the holding that the rule is entitled to no

consideration, without regard to whether the rule is reasonable or not and no matter what the reasons for its adoption and application.

The Fourth Circuit's decision conflicts directly with the decisions of two other circuits. Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986) and Marshall v. Provision House Workers Union, Local 274, Amalgamated Meat Cutters and Butcher Workmen, 623 F. 2d 1322 (9th Cir. 1980) hold that unions are entitled to adopt and enforce reasonable nondiscriminatory rules for the distribution of campaign literature in compliance with section 401(c) and that the appropriate focus in determining whether a request is reasonable is on such rules. Both courts emphasize the important statutory policies which require this result.

Thus, the Third Circuit in Metropolitan District Council, stated:

> We agree that a union may adopt and enforce reasonable, non-discriminatory rules for the distribution of campaign literature in compliance with section 401 (c). Unlike the ad hoc balancing test which the Secretary here would require the union leadership to engage in whenever a request for distribution is made, permitting the imposition of uniform rules avoids even the appearance of disparate treatment. Moreover, by minimizing judicial second-guessing, permitting such rules furthers the Act's policy of "balanc[ing] between the public interest in free and democratic union elections on the one hand, and the importance of minimizing government encroachment on union autonomy, on the other hand,"Brennan v. Local 122, Amalgamated Clothing Workers, 564 F. 2d 657, 660 (3d Cir. 1977) (footnote omitted).

797 F. 2d at 144. Similarly, in Provision House, the Ninth Circuit, indicating that a union's administrative reasons for adopting standards to govern mailing were entitled to respect, stated:

> Making exceptions to the rule, by complying with the challengers' late distribution requests, could have undercut the purpose of the election rules--to eliminate the potential for discrimination among candidates by establishing a uniform set of standards governing all candidates. Candidates challenging incumbent union officers normally expect to do some homework and to comply with rules. We conclude that the district court could properly find that, because strict enforcement of the ten-day rule was necessary, distribution requests violating that requirement were unreasonable and the union had no duty to comply with them.

(623 F. 2d at 1325-1326).

The conflict between the circuits also makes review important to parties other than those before the Court. Without a single governing interpretation of the statute, the status of the rules of all other unions is uncertain. The issue of whether a request to distribute literature is properly granted or denied may arise not only upon the pre-election suit of a candidate, but also upon the Secretary of Labor's suit, pursuant to 29 U.S.C. § 482, to set aside an

election already held. Resolution of the conflict will assist unions and candidates nationwide in measuring their rights and duties, as well as the Secretary.

The conflict between the Fourth's Circuit's decision and the principles set forth in these cases and in Sadlowski suggests that review is appropriate. The lower court's decision severely impinges on the power of unions to govern themselves, in contravention of the legislative intent and precedent. The construction of the statute required by this case furnishes an opportunity to decide important issues relating to the purview of federal regulation of union affairs. For these reasons, petitioners submit that review is in the public interest.

CONCLUSION

For the reasons stated, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2876

TIMOTHY A. BROWN, Plaintiff-Appellee,

v.

ROBERT J. LOWEN, F. ELWOOD KYSER, and INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS Defendants-Appellants,

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Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (C.A. 88-1994-JFM)

Argued: July 28, 1988
Decided: September 14, 1988

Before RUSSELL, WIDENER and HALL, Circuit Judges.

W. Michel Pierson for Appellants. Paul Alan Levy (Arthur L. Fox, II; Alan B. Morrison, PUBLIC CITIZEN LITIGATION

GROUP on brief) for Appellee.

RUSSELL, Circuit Judge:

This appeal is from an order of the district court issuing a preliminary injunction in favor of the plaintiff, Timothy Brown. Plaintiff is a candidate for president of the International Organization of Masters, Mates and Pilots (IOMPP) of which defendant, Robert Lowen, is the current president. The district court has ordered IOMPP to provide plaintiff with mailing labels containing the names and addresses of voting members of the union. Though the order of the district judge related to an application for a preliminary injunction, the granting of the motion in effect constituted a decision on the merits. Accordingly, we have reviewed this case on the merits, doing so, we affirm the decision of the district

court as one on the merits.

IOMPP is a labor organization comprised of workers in the maritime industry. The union conducts quadrennial elections of its officers. Nominations of candidates for these offices are made at the union's convention. Any eligible member of the union may be nominated. To be eligible a person need be a union member in good standing. A member may even nominate himself. Ballots containing the names of those nominated are then mailed to members of the union not sooner than ten days nor later than thirty days after the end of the convention. The union then allows ninety days from the mailing of the ballots until they must be returned.

The crux of this dispute arises from plaintiff's desire to distribute campaign literature, at his own expense,

to the union's membership before the nominating convention. Only through the union can plaintiff obtain a complete list of the union membership with their addresses. However, the procedures used by the union provide that the "[t]he right to distribution of literature only commences after the nomination procedure is complete."

The Labor-Management Reporting and Disclosure Act of 1959 at 29 U.S.C. § 481(c), however, provides in pertinent part that unions and their officers "shall be under a duty, enforceable at the suit of any bona fide candidate for office... to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization..." It is on this provision

of the Act that the plaintiff relies for his right to have his campaign material mailed to union members within thirty days before the quadrennial meeting of the union.

The Act seems plain on its face: If the request to distribute by one qualified to be a candidate for union office, even though he is yet to be nominated is "reasonable" the union is required to "comply with all [such] reasonable requests." This language conditions the right of the contesting union office seeker to have his campaign material distributed only on the reasonableness of his request. If his request is reasonable, the language of the statute granting the request is mandatory. Whether the request is reasonable is a matter to be determined consistent "with the Act's command to unions to conduct 'free and democratic'

union elections." Steelworkers v. Usery, 429 U.S. 305, 309 (1977). Accordingly, if it can be said that the candidate's request is reasonable the statute upholds the right of the candidate to have his request granted. Such conclusion is nothing more than a reading of the plain language of the statute and, we said recently in United States v. Morison, 844 F. 2d 1057, 1064 (4th Cir. 1988), when the terms of "a statute are unambiguous on their face, or in light or ordinary principles of statutory interpretation, then judicial inquiry is complete (citations omitted)." We find that whether the plaintiff is entitled to have his request granted depends entirely on whether his request may be said to be reasonable.

Our reading of the statute accords with the administrative construction of

the statute's mandate as declared by the Secretary of Labor, to whom the enforcement of the statute is entrusted. The Department of Labor has repeatedly declared that the statutory command is to be observed if it is reasonable. It has stated categorically that, under its construction of the statute, the critical issue is not whether the union's rules or by-laws are reasonable (as the union argues) but whether the request of the plaintiff is reasonable, primarily in its timing. Indeed, in a letter to the union regarding this specific request of the plaintiff, the Director of the Office of Elections, Trusteeships and International Union Audits of the Department of Labor, advised that

> A self-professed candidate is entitled to make campaign literature mailings at his own expense and may ask the union to have them sent within a

> reasonable period of time prior to the election. In the present situation, a request for a mailing to be made approximately one month prior to nominations would appear to be reasonable. Failure or refusal by the union to honor a legitimate mailing request is a continuing violation of Title IV which might, under certain circumstances, affect the outcome of the election.

While this opinion of the Department is not binding, it is an opinion entitled to consideration by this Court and is not to be lightly disregarded.

Moreover, this opinion of the Department seems to be in clear accord with Congress' intent of "insur[ing] union democracy" in its enactment of 11 U.S.C. § 481. Professor Clyde Summers who authored a "Bill of Rights for Union Members" which formed the basis of the statute in question, has stated that "[t]he declared and unquestioned purpose of Congress was to ensure fair and democratic elections. Congress

recognized that one of the major obstacles to meaningful elections was the inherent advantage of incumbents and it sought to curb the advantage." Summers, Democracy In A One-Party State: Perspectives From Landrum-Griffin, 43 Md. L. Rev. 93, 117-118 (1984). When the union bureaucracy has exclusive control of the union membership lists, with addresses, as in this case, and particularly the local union officers, the advantages of incumbency over any attempt of an insurgent to promote his candidacy before or after the quadrennial nominating convention of the union are obvious. By requiring unions to comply with all reasonable requests of candidates for access to the union lists these advantages of incumbency are reasonably moderated. And it was to provide that very moderation of the advantages of incumbency which was the

intention of the Act.

There does not seem to be any contention that the request of the plaintiff herein is unreasonable. Nor do we understand the union to argue that plaintiff's request is unreasonable. Its position is that the union by-laws provide that "[t]he right to distribution of [campaign] literature only commences ater the nomination procedure is complete." Whether intended or not, the manifest result of this is to delay the insurgent candidate in beginning his campaign and to reduce the time within which he can make his appeal to the voters. The incumbents, however, have had four years in which they have enjoyed the exclusive right to the voter lists and addresses and to cultivate their relations with the local union officers who would be expected to have the greatest influence with the

rank and file. During all this time, too, the incumbents had had control over the union press and its newsletter to the members. The advantages of the union by-law to the incumbent cannot be questioned. However, the union justifies its by-law as a reasonable method of satisfying the Act's prohibition against "discrimination in favor of or against any candidate with respect to the use of lists of members..." Beyond that, it takes the position that the relevant reasonableness standard is not the one to be applied in determining the reasonableness of the insurgent's request, but is the one to be applied in determining the reasonableness of the union's restraint on the right to have his "reasonable request" granted. We are not persuaded by the union's reasoning.

In the first place, we find nothing discriminatory in granting the plaintiff's request made within thirty days of the quadrennial convention, since any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff. Granting the plaintiff's request is simply an attempt at a partial redress of the advantage the incumbent has; it is not an attempt at hobbling or gaining any advantage over any other candidate. The union has identified no way in which granting the plaintiff's request will operate as a discrimination against any other possible candidate for union office. Actually, the granting of the request simply reduces the discrimination of exclusive control by the union incumbents over the electoral lists. There is no conceivable way in which the granting of plaintiff's request will

work a discrimination against any other union members.

Neither do we agree with the union that the question posed by this controversy is the reasonableness of the union's by-law. The criterion for resolving this controversy is the reasonableness of the plaintiff's request. Of course, in assessing the reasonableness of the request it is entirely proper to consider whether granting the request would work a discrimination against other candidates. But that question is to be considered as a part of the question whether the plaintiff's request was reasonable. So far as we are able to understand, the union does not urge in objection to plaintiff's claim that the granting of his request will result in any discrimintion. And well they could not, since any other candidate could exercise

exactly the same right as that requested by the plaintiff.

It follows that we find no basis in this record for excusing the union from conforming with the plain command of the statute. It certainly stands the statute on its head to do as the union argues by making the issue the reasonableness of the union by-law rather than, as the statute declares, making the issue the reasonableness of the plaintiff's request. The command of the statute may not legitmately be subordinated to the somewhat ambiguous language of a union by-law. Such a rule would render union by-laws superior to the congressional mandate and would provide dissident unions with a ready means for nullifying the statute's command. We are not disposed to uphold such a misconception of congressional power in this field. We think the

district court ruled correctly in granting relief to the plaintiff.

We are aware that our judgment is contrary to that of the Third Circuit as expressed in Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986). In that case, the Third Circuit upheld the union's decision not to release mailing labels prior to a certain date because "[t]he union's rule here was a reasonable one." Ibid. at 144. As we have previously stated, we believe the test to be not whether the union's rule was reasonable but whether the candidate's request was reasonable. For this reason, we respectfully disagree with the judgment of the Third Circuit.

Accordingly, the judgment of the district court is

AFFIRMED.

HALL, Circuit Judge, dissenting:

I cannot agree with the majority that IOMPP has failed to comply with its duty to honor a reasonable request by a candidate for union office. In my view, a request for mailing that conflicts with the established internal procedures of a union is per se unreasonable unless the union's procedures are shown to be unfair or discriminatory. By affirming the district court's contrary conclusion, the majority has today adopted an unduly restrictive interpretation of the Labor Management Reporting and Disclosure Act ("LMRDA" or "the Act") that is inconsistent with the statutory purpose and in clear conflict with the decisions of two of our sister circuits.

As the majority correctly recognizes, the Act implements Congress' clearly expressed desire to promote

"union democracy." I further agree that, as a corollary to that goal, the statute prohibits undue electoral discrimination in favor of incumbents. Democracy, however, is not a standardless expression of majority rule but, rather, a system of ordered liberty in which the will of the electorate is determined through fair and equitable procedures. In this case there has been no finding or even persuasive suggestion that IOMPP's election procedures limiting candidate mailings until after the formal nomination process is unfair, discriminatory, or provides any undue advantage to incumbents. The majority, as did the district court, has concluded, however, that the fairness of the union's rules is irrelevant and that the reasonableness of a would-be candidate's request is to be assessed

solely by examining the request itself.[1] In my view that approach is not only simplistic but also threatens the broader goals of the Act.

In the first instance, the reasonableness of any action requires consideration of the underlying factual context. A request to light a candle in a darkened room may seem eminently reasonable if examined in isolation but when the same request is made in a room filled with gas fumes, the reasonableness is substantially diminished. While appellee Brown's request that the union mail his campaign literature without regard to its established procedure may have carried

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1. Contrary to the majority's suggestion, the union has sought to argue that appellee's request for mailing was unreasonable. The union simply bases its argument, in a broader context, than the majority is willing to consider.

union's ability to organize its own internal affairs.

The Supreme Court has recognized that the LMRDA was not intended to "undermine union self-government." United Steelworkers of America v. Sadlowski, 457 U.S. 102, 117 (1982). Moreover, the Court noted that although incombency carries certain undoubted natural advantages, it should not be overstated. Id. at 114. Logically, the Act does not sanction judicial intrusion into union internal matters unless the union has unfairly distorted the normal democratic process to favor incumbents. I can see no indication that IOMPP's rules which appellee seeks to avoid would accomplish that end.

Both the Third Circuit in Donovan v. Metropolitan District Council of Carpenters, 797 F. 2d 140 (3d Cir. 1986), and the Ninth Circuit in Marshall

v. Provision House Workers Union, Local 274, Amalgamated Meat Cutters and Butcher Workers, 623 F. 2d 1322 (9th Cir. 1980), have concluded that a candidate's compliance with reasonable nondiscriminatory union procedures is relevant to whether a mailing request is itself reasonable. I would agree completely with the Donovan court that fair uniform rules which avoid even the "appearance of disparate treatment" and minimize the likelihood of "needless judicial second guessing." Donovan, 797 F. 2d at 144 are not to be treated lightly in judicial proceedings.

In contrast to the salutary doctrine developed in the Third and Ninth Circuits, the majority has concluded that unions are without power to structure their own electoral process even when that process serves the Act's broader purposes of promoting union

democracy. I cannot accept that section 481(c) of the statute requires such an irrational result.

[2] Accordingly, I would reverse the district court and, therefore, I respectfully dissent from the majority's decision.

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2. I find little significance in the fact that the Secretary of Labor has taken a position in this case similar to that articulated by the majority. While the views of the administrative agency to which statutory enforcement is entrusted are entitled to some deference, we need not accept those views blindly. In this instance, the Secretary's position is not only contrary to reasonable statutory interpretation, it is also arguable in conflict with his own regulations. At 29 C.F.R. § 452.67, the Department of Labor clearly envisions that distribution of campaign literature may be subject to rules governing the methods of distribution and requires the union to inform all candidates of the nature of those conditions. The Secretary's instant position renders any such distribution rules superfluous.

APPENDIX B

Timothy A. BROWN, Plaintiff-Appellee,

v.

Robert J. LOWEN, F. Elwood Kyser,

International Organization of Masters,

Mates and Pilots, Defendants-Appellants.

No. 88-2876

United States Court of Appeals,

Fourth Circuit.

Argued April 10, 1989.

Decided Nov. 17, 1989.

W. Michel Pierson, Baltimore, Md., for defendants-appellants.

Paul Alan Levy (Arthur L. Fox, II, Alan B. Morrison, Public Citizen Litigation Group, Washington, D. C., on brief), for plaintiff-appellee.

Helen Boetticher, Counsel for Litigation (Jerry G. Thorn, Acting Sol., John F. Depenbrock, Associate Sol, Barton S. Widom, Deputy Associate Sol., Sharon E. Hanley, U.S. Dept. of Labor,

Washington, D. C., on brief), for amicus curiae.

Before ERWIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

ON PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING

IN BANC

PER CURIAM:

The en banc court adopts the majority panel opinion sustaining the district court's grant of an affirmative injunction in favor of the plaintiff-appellee against the defendants-appellants, as its opinion herein. Brown v. Lowen, 857 F. 2d 216 (4th Cir. 1989). Judge Hall, however, adheres to his dissent to the panel opinion and relies on it in dissent to the en banc decision herein, and Judge Phillips in joining Judge Hall's dissent has filed a

separate dissenting statement of his views.

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

I agree with Judge Hall's view, and that of the Third and Ninth Circuits, as I understand them, that the first step in assessing the reasonableness, under §481(c), of a candidate's request that is at odds with a union's general rule on the subject, is to consider whether the general rule is unfair or arbitrary in its general application. If a union's general rule is not unfair or arbitrary in its general application, then a candidate's request to be exempted from its requirements is obviously "unreasonable." If this is not so, then there is little reason for unions to attempt to regulate election procedures by general rules. All of us can probably demonstrate from time to

time that general rules of one kind or another--from traffic laws to income tax laws--are unreasonable in their particular applications to us, hence that our request for specific exemptions would be "reasonable" if assessed independently of the general rule's justification. For democracy to work in union affairs as in affairs at large, however, it must be considered unreasonable for an individual to insist upon being made a special case, exempt from the requirements of general laws that are not unfair or arbitrary in their general application.

Because the district court failed to apply this principle, I would vacate the preliminary injunction and remand for further proceedings faithful to it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TIMOTHY A. BROWN	:	
v.	:	Civil No. HAR-88-1994
ROBERT J. LOWEN,	:	
et al.	:	

MEMORANDUM

The purpose of this memorandum is to restate briefly the reasons recited by this Court on the record on July 25, 1988 for the issuance of a preliminary injunction.

Plaintiff is running for president of the International Organization of Masters, Mates and Pilots ("IOMMP"). The preliminary injunction which he has sought and which this Court has issued requires defendants to mail his campaign literature to the union membership at his own expense. The critical issue

presented in this case is the validity of an IOMMP rule which permits the distribution of campaign literature only after IOMMP's convention has been held and approximately ninety days before the election ballots which are distributed after the convention to the membership must be returned.

A threshold question is presented as to the standard by which this Court is to review IOMMP's rule. Defendants contend that the inquiry which this Court must make is whether the rule is "reasonable." This Court does not agree. 29 U.S.C. Section 481(c) clearly provides that unions and their offiers "shall be under a duty, enforceable at the suit of any bona fide candidate... to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature

in aid of such person's candidacy to all members in good standing of such labor organization." This mandate could not be more clear. Thus, although a union certainly may- indeed should- adopt a rule known to all candidates in advance setting forth the terms and conditions under which campaign literature will be distributed by the union, in evaluating the validity of the rule a court must inquire not simply whether the rule may be said to be "reasonable" but whether its application results in the rejection of a reasonable request made by a candidate. The IOMMP rule here in question unquestionably has that effect since the request being made by plaintiff- to distribute his campaign literature approximately one month before the union's convention is held- is clearly reasonable.

Even if the standard of review is the "reasonableness" of the IOMMP's rule, this Court finds that the rule is unreasonable.

First, a rule which prohibits pre-convention distribution of campaign literature is per se unreasonable. Although under IOMMP's constitution a candidate may self-nominate himself at the convention, the dynamics of the political process are such that in order to promote an effective candidacy, a non-incumbent candidate must have the opportunity to have the convention delegates consider the merits of his candidacy before they assemble. These delegates are leaders of their leaders of their local unions, and it is obviously important to a candidate to attempt to elicit their support in order to have them work for them during the post-convention election process. It is

virtually impossible for a non-incumbent candidate to engender such support at the convention itself without having had an opportunity to introduce himselF and his ideas by mailings made prior to the convention. A lawyer might as well walk into trial unprepared.

Second, although a ninety day period between the time that campaign literature is sent out and the time that ballots must be returned may seem reasonable on its face, it is undisputed that the nature of the work of the members of the union takes them away from home for substantial periods of time. This is the very reason for the relatively long ninety day period for the return of ballots. Under these circumstances while it may be that the campaign literature will have been distributed to the union members by the time that they exercise their vote, it

is unrealistic to believe that union members will have conferred with one another concerning the merits of the respective candidacies before casting their ballots within the ninety day period. This underscores the need for an earlier mailing.

It is for these reasons that this Court entered a preliminary injunction in favor of plaintiff. This injunction is stayed pending defendants' seeking to obtain a decision from a Judge of the Fourth Circuit either reversing the granting of the injunction or continuing the stay pending review of the injunction by a full panel of the Court.

Date: July 26, 1988

/s/ J. Frederick Motz
United States
District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

TIMOTHY A. BROWN,	:	
Plaintiff,	:	
v.	:	Civil No. HAR 88-1994
ROBERT J. LOWEN, F. ELWOOD KYSER and INTERNATIONAL ORGANIZATION of MASTERS, MATES, AND PILOTS,	:	
Defendants.	:	

ORDER

The Court finds that plaintiff is likely to succeed on the merits, that the balance of hardships is decidedly in favor of the plaintiff, and that the public interest favors preliminary relief. Accordingly, IT IS HEREBY ORDERED THAT

1. Defendants Robert Lowen, Elwood Kyser, and International Organization of Masters, Mates, and Pilots ("IOMMP") shall, within forty-eight hours, and

again in response to any future requests, deliver a set of Cheshire labels bearing the names and addresses of all members of the IOMMP who are eligible to vote in upcoming election of officers, or any groups of members requested by Brown whose names can be segregated by the computer on which the list is kept, to a mailing service which is acceptable to the parties and which is capable of mailing plaintiff Brown's literature by the use of such labels.

2. Plaintiff Brown shall pay to defendant IOMMP $100.00 for the cost of preparing a set of mailing labels. Plaintiff Brown shall also be responsible for all costs of the mailing service.

Dated: July 25, 1988

/s/ J. Frederick Motz